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Information Exchange between Competitors

INFORMATION EXCHANGE BETWEEN COMPETITORS

Information Exchange between Competitors

The European Commission (EU Commission) has revised its regulations regarding cooperation agreements between competitors, so-called horizontal agreements. The regulations have been in force since January 1, 2011 and include two block exemption regulations (for specialization as well as research and development agreements) together with revised guidelines for horizontal agreements. A core element of the reform of the so-called horizontal guidelines (guidelines) is the newly added chapter regarding information exchange.

The guidelines of the EU Commission apply not only to companies domiciled in the EU, but to all companies as long as their business affects competition in the EU market.

Primary Aspects

Attention should be paid to the following aspects:

- Information exchange may have anti-competitive effects and may be qualified as a cartel and therefore might be sanctioned.
- The unilateral disclosure of information may be qualified as illegal information exchange, as far as the recipient accepts the information.
- To assume an illegal information exchange it may be sufficient, if the exchange aims to achieve a restraint of competition. In this event, the actual effects on competition will not be examined.
- Whether an information exchange leads to anti-competitive effects or not depends on the economic conditions in the relevant markets as well as on the characteristics of the information exchanged.
- In transparent, concentrated, non-complex, stable and symmetric markets it is more likely that anti-competitive results are caused.
- Likewise, the exchange of strategic data (prices, production costs, etc.), company-specific, current or non-public data, are more likely to lead to anti-competitive effects.
- The frequency of the information exchange and the market position of the companies involved have to be taken into consideration as well.

Need for Action

What needs to be done?

- Caution is required upon receipt of information from competitors. If the recipient does not explicitly refuse the information, it is assumed that he accepts the information. This might meet the requirements of an illegal information exchange already.
- In the event of ongoing or intended information exchange with competitors, the relevant market where the companies are active, as well as the characteristics of the information exchanged have to be analyzed carefully under the guidelines. Exchange of aggregated information which does not identify the position of an individual business, is allowed. Caution is required with regard to the exchange of strategic, company-specific, current and confidential data.
- If necessary, existing or intended agreements and conduct have to be revised and adapted.

Exchange of Information – an Overview

In general

In the guidelines, the EU Commission affirms that the exchange of business information between competitors may have a pro-competitive effect and may lead to substantial gains in efficiency. Information exchange may have pro-competitive effects in particular, if it allows companies to collect market data in order to become more efficient and more capable to satisfy customer requests. However, the EU Commission emphasizes, that the exchange of information may have anti-competitive effects, if such exchange provides information about the market strategies of competitors. This is the case, for example, if information regarding future price or production pattern is exchanged.

The guidelines explain comprehensively how an information exchange is to be examined with respect to its compatibility with EU competition law.

Illegal information exchange

An information exchange between competitors is illegal, if the relevant market thereby is prone to coordination or if the information exchange leads to an agreement, a concerted practice or a decision of an association of companies in particular with the purpose of fixing prices or quantities. This kind of information exchange is deemed as a cartel and is punishable with fines.

A concerted practice is sufficient

Information exchange may cause a coordination of market behaviour without an explicit agreement, which is illegal, if a restraint of competition is aimed or caused by this exchange.

A concerted practice arises in particular:

- if the exchange of information lowers the strategic ambiguity on the market with respect to the behaviour of competitors. In such cases, the exchange of strategic data (e.g. future prices) between competitors become aligned through concerted behaviour.
- if only one company unilaterally discloses strategic information to a competitor and the competitor accepts this information without protest. It is assumed that a company that receives e.g. strategic data from a competitor (in a meeting, by mail or electronically) accepts this information, unless it explicitly refuses to receive the data.

On the other hand, no concerted practice is assumed, if the unilaterally disclosed information of a company is really “in the public domain”, e.g. information that is published in a newspaper.

Assessment under antitrust laws

The EU Commission emphasizes that an agreement or concerted practice in itself is not necessarily illegal. In addition there needs to be the object or effect of a restraint of competition.

While analysing whether an information exchange has an anti-competitive object the EU Commission refers in particular to the legal and economic context in which the exchange takes place. For example, the exchange of company-specific data regarding future practices regarding prices or quantities between competitors is deemed to aim at a restraint of competition. This means, the actual effects on competition will not be examined in such events.

Whether the exchange of information has anti-competitive effects needs to be examined based on each individual case, since the result of such examination depends on various specific factors. The assessment depends on the economic conditions in the relevant markets as well as on the characteristics of the information exchanged.

- economic conditions in the relevant markets:

According to the EU Commission, in transparent, concentrated, non-complex, stable and symmetric markets, it is more likely that restraints on competition are caused. However, it is possible that in other market situations an information exchange may cause anti-competitive effects because it increases transparency of the market, reduces complexity and mitigates instabilities and compensates asymmetry.

- characteristics of the information exchanged:

STRATEGIC DATA:

The exchange of information with respect to prices (e.g. current prices, price reductions, price increases, price cuts or discounts), client lists, production costs, quantities, turnover, sales figures, capacity, quality, marketing concepts, risks, investments, technology as well as research and development programs will most likely have an anti-competitive impact.

MARKET COVERAGE:

If the companies involved in the information exchange cover a significant part of the relevant market, the exchange is more likely to have anti-competitive effects.

COMPANY-SPECIFIC DATA:

The exchange of individual, company-specific data is much more likely to have an anti-competitive impact than the exchange of aggregated data.

AGE OF THE DATA:

The exchange of historic data will likely not have an anti-competitive impact, since such data may hardly be informative with respect to the future practice of competitors and will not lead to a common understanding of the market.

FREQUENCY OF EXCHANGE:

Frequent information exchange, which enables a better understanding of the market as well as a monitoring of discrepancies, increases the risks of a restraint of competition.

PUBLICITY OF INFORMATION:

It is unlikely that the exchange of public information violates EU competition law. An exchange of information is public if the data exchanged is equally accessible for all competitors and customers.

